

F-238
M128
-1

EXECUTIVE POWER.

BY

B. R. CURTIS.

BOSTON:

LITTLE, BROWN AND COMPANY.

1862.

EXECUTIVE POWER.

BY

B. R. CURTIS.

BOSTON:

LITTLE, BROWN AND COMPANY.

1862.


RIVERSIDE, CAMBRIDGE:
PRINTED BY H. O. HOUGHTON.

To
ALL PERSONS WHO HAVE SWORN TO SUPPORT
THE CONSTITUTION OF THE UNITED STATES,
AND

ALL CITIZEN S WHO VALUE THE PRINCIPLES OF CIVIL LIBERTY WHICH
THAT CONSTITUTION EMBODIES, AND FOR THE PRESERVATION OF
WHICH IT IS OUR ONLY SECURITY,

These Pages
ARE RESPECTFULLY DEDICATED

BY THE AUTHOR.



Digitized by the Internet Archive
in 2010 with funding from

The Institute of Museum and Library Services through an Indiana State Library LSTA Grant

P R E F A C E.

EXTRACT FROM PRESIDENT LINCOLN'S PROCLAMATION OF SEPTEMBER 22, 1862.

“THAT on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to suppress such persons, or any of them, in any efforts they may make for their actual freedom.

“That the Executive will, on the first day of January aforesaid, by proclamation, designate the States, and parts of States, if any, in which the people thereof respectively shall then be in rebellion against the United States; and the fact that any State, or the people thereof, shall on that day be in good faith represented in the Congress of the United States, by members chosen thereto at elections wherein a majority of the qualified voters of such State shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such State, and the people thereof, are not then in rebellion against the United States.”

“Understand, I raise no objection against it on legal or constitutional grounds; for, *as commander-in-chief of the army and navy, in time of war, I suppose I have a right to take any measure which*

may best subdue the enemy." — PRESIDENT LINCOLN TO THE CHICAGO DELEGATION.

PROCLAMATION OF SEPTEMBER 24, 1862.

"WHEREAS, it has become necessary to call into service not only volunteers, but also portions of the militia of the States by draft, in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure, and from giving aid and comfort in various ways to the insurrection :

"Now, therefore, be it ordered, —

"*First.* That during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to the rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts-martial or military commission.

"*Second.* That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority, or by the sentence of any court-martial or military commission.

"In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

"Done at the city of Washington, this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

"ABRAHAM LINCOLN.

"By the President :

"WILLIAM H. SEWARD, *Secretary of State.*"

ORDERS OF THE SECRETARY OF WAR PROMULGATED SEPTEMBER
26, 1862.

First. There shall be a provost marshal general of the war department, whose headquarters will be at Washington, and who will have the immediate supervision, control, and management of the corps.

Second. There will be appointed in each State one or more special provost marshals, as necessity may require, who will report and receive instructions and orders from the provost marshal general of the war department.

Third. It will be the duty of the special provost marshal to arrest all deserters, whether regulars, volunteers, or militia, and send them to the nearest military commander or military post, where they can be cared for and sent to their respective regiments; to arrest, upon the warrant of the judge advocate, all disloyal persons subject to arrest under the orders of the war department; to inquire into and report treasonable practices, seize stolen or embezzled property of the government, detect spies of the enemy, and perform such other duties as may be enjoined upon them by the war department, and report all their proceedings promptly to the provost marshal general.

Fourth. To enable special provost marshals to discharge their duties efficiently, they are authorized to call on any available military force within their respective districts, or else to employ the assistance of citizens, constables, sheriffs, or police-officers, so far as may be necessary under such regulations as may be prescribed by the provost marshal general of the war department, with the approval of the Secretary of War.

Fifth. Necessary expenses incurred in this service will be paid on duplicate bills certified by the special provost marshals, stating time and nature of service, after examination and approval by the provost marshal general.

Sixth. The compensation of special provost marshals will be — dollars per month, and actual travelling expenses, and postage will be refunded on bills certified under oath and approved by the provost marshal general.

Seventh. All appointments in this service will be subject to be revoked at the pleasure of the Secretary of War.

Eighth. All orders heretofore issued by the war department, conferring authority upon other officers to act as provost marshals, except those who received special commissions from the war department, are hereby revoked.

By order of the Secretary of War,

L. THOMAS, Adjutant-General.

EXECUTIVE POWER.

No citizen can be insensible to the vast importance of the late proclamations and orders of the President of the United States. Great differences of opinion already exist concerning them. But whatever those differences of opinion may be, upon one point all must agree. They are assertions of transcendent executive power.

There is nothing in the character or conduct of the chief magistrate,—there is nothing in his present position in connection with these proclamations, and there is nothing in the state of the country, which should prevent a candid and dispassionate discussion either of their practical tendencies, or of the source of power from whence they are supposed to spring.

The President, on all occasions, has manifested the strongest desire to act cautiously, wisely, and for the best interests of the country. What is commonly called his proclamation of emancipation, is, from its terms and from the nature of the case, only a declaration of what, at its date, he believed might prove expedient, within yet undefined territorial limits, three months hence, thirty days after the next meeting of Congress, and within territory not at present subject even to our military control. Of course such an executive declaration as to his future intentions, must be understood by the people to be liable to be modified by events, as well as subject to such changes of views, respecting the extent of his own powers, as a more mature, and possibly a more enlightened consideration may produce.

In April, 1861, the President issued his proclamation, declaring that he would treat as pirates all persons who should cruise, under the authority of the so-called Confederate States, against the commerce of the United States.

But subsequent events induced him, with general acquiescence, to exchange them as prisoners of war. Not from any fickleness of purpose; but because the interests of the country imperatively demanded this departure from his proposed course of action.

In like manner, it is not to be doubted by any one who esteems the President honestly desirous to do his duty to the country, under the best lights possible, that when the time for his action on his recent proclamations and orders shall arrive, it will be in conformity with his own wishes, that he should have those lights which are best elicited in this country by temperate and well-considered public discussion; discussion, not only of the practical consequences of the proposed measures, but of his own constitutional power to decree and execute them.

The Constitution has made it incumbent on the President to recommend to Congress such measures as he shall deem necessary and expedient. Although Congress will have been in session nearly thirty days before any executive action is proposed to be taken on this subject of emancipation, it can hardly be supposed that this proclamation was intended to be a recommendation to them. Still, in what the President may perhaps regard as having some flavor of the spirit of the Constitution, he makes known to the people of the United States his proposed future executive action; certainly not expecting or desiring that they should be indifferent to such a momentous proposal, or should fail to exercise their best judgments, and afford their best counsels upon what so deeply concerns themselves.

Our public affairs are in a condition to render unanimity, not only in the public councils of the nation, but among the people themselves, of the first importance. But the President must have been aware, when he issued these proclamations, that nothing approaching towards unanimity upon their subjects could be attained, among the people, save through their public discussion. And as his desire to act in accordance with the wisest and best settled and most energetic popular sentiment cannot be doubted, we may justly believe that executive action has been postponed, among other reasons, for the very purpose of allowing time for such discussion.

And, in reference to the last proclamation, and the

orders of the Secretary of War, intended to carry it into practical effect, though their operation is immediate, so far as their express declarations can make them so, they have not yet been practically applied to such an extent, or in such a way, as not to allow it to be supposed that the grounds upon which they rest are open for examination.

However this may be, these are subjects in which the people have vast concern. It is their right, it is their duty, to themselves and to their posterity, to examine and to consider and to decide upon them; and no citizen is faithful to his great trust if he fail to do so, according to the best lights he has, or can obtain. And if, finally, such examination and consideration shall end in diversity of opinion, it must be accepted as justly attributable to the questions themselves, or to the men who have made them.

It has been attempted by some partisan journals to raise the cry of "disloyalty" against any one who should question these executive acts.

But the people of the United States know that loyalty is not subserviency to a man, or to a party, or to the opinions of newspapers; but that it is an honest and wise devotion to the safety and welfare of our country, and to the great principles which our constitution of government embodies, by which alone that safety and welfare can be secured. And, when those principles are put in jeopardy every truly loyal man must interpose, according to his ability, or be an unfaithful citizen.

This is not a government of men. It is a government of laws. And the laws are required by the people to be in conformity with their will, declared by the Constitution. Our loyalty is due to that will. Our obedience is due to those laws; and he who would induce submission to other laws, springing from sources of power not originating in the people, but in casual events, and in the mere will of the occupants of places of power, does not exhort us to loyalty, but to a desertion of our trust.

That they whose principles he questions have the conduct of public affairs; that the times are most critical; that public unanimity is highly necessary; while these facts afford sufficient reasons to restrain all opposition upon any personal or party grounds, they can afford no good reason, — hardly a plausible apology, — for failure to oppose usurp-

ation of power, which, if acquiesced in and established, must be fatal to a free government.

The war in which we are engaged is a just and necessary war. It must be prosecuted with the whole force of this government till the military power of the South is broken, and they submit themselves to their duty to obey, and our right to have obeyed, the Constitution of the United States as "the supreme law of the land." But with what sense of right can we subdue them by arms to obey the Constitution as the supreme law of *their* part of the land, if we have ceased to obey it, or failed to preserve it, as the supreme law of *our* part of the land.

I am a member of no political party. Duties, inconsistent, in my opinion, with the preservation of any attachments to a political party, caused me to withdraw from all such connections, many years ago, and they have never been resumed. I have no occasion to listen to the exhortations, now so frequent, to divest myself of party ties, and disregard party objects, and act for my country. I have nothing but my country for which to act, in any public affair; and solely because I have that yet remaining, and know not but it may be possible, from my studies and reflections, to say something to my countrymen which may aid them to form right conclusions in these dark and dangerous times, I now, reluctantly, address them.

I do not propose to discuss the question whether the first of these proclamations of the President, if definitively adopted, can have any practical effect on the unhappy race of persons to whom it refers; nor what its practical consequences would be, upon them and upon the white population of the United States, if it should take effect; nor through what scenes of bloodshed, and worse than bloodshed, it may be, we should advance to those final conditions; nor even the lawfulness, in any Christian or civilized sense, of the use of such means to attain *any* end.

If the entire social condition of nine millions of people has, in the providence of God, been allowed to depend upon the executive decree of one man, it will be the most stupendous fact which the history of the race has exhibited. But, for myself, I do not yet perceive that this vast responsibility is placed upon the President of the United States. I do not yet see that it depends upon his executive decree,

whether a servile war shall be invoked to help twenty millions of the white race to assert the rightful authority of the Constitution and laws of their country, over those who refuse to obey them. *But I do see that this proclamation asserts the power of the Executive to make such a decree.*

I do not yet perceive how it is that my neighbors and myself, residing remote from armies and their operations, and where all the laws of the land may be enforced by constitutional means, should be subjected to the possibility of military arrest and imprisonment, and trial before a military commission, and punishment at its discretion for offences unknown to the law; a possibility to be converted into a fact at the mere will of the President, or of some subordinate officer, clothed by him with this power. *But I do perceive that this executive power is asserted.*

I am quite aware, that in times of great public danger, unexpected perils, which the legislative power have failed to provide against, may imperatively demand instant and vigorous executive action, passing beyond the limits of the laws; and that, when the Executive has assumed the high responsibility of such a necessary exercise of mere power, he may justly look for indemnity to that department of the government which alone has the rightful authority to grant it;—an indemnity which should be always sought and accorded *upon the clearest admission of legal wrong*, finding its excuse in the exceptional case which made that wrong absolutely necessary for the public safety.

But I find no resemblance between such exceptional cases and the substance of these proclamations and these orders. They do not relate to exceptional cases—they establish a system. They do not relate to some instant emergency—they cover an indefinite future. They do not seek for excuses—they assert powers and rights. They are general rules of action, applicable to the entire country, and to every person in it; or to great tracts of country and to the social condition of their people; and they are to be applied whenever and wherever and to whomsoever the President, or any subordinate officer whom he may employ, may choose to apply them.

Certainly these things are worthy of the most deliberate and searching examination.

Let us, then, analyze these proclamations and orders of

the President; let us comprehend the nature and extent of the powers they assume. Above all, let us examine that portentous cloud of the military power of the President, which is supposed to have overcome us and the civil liberties of the country, pursuant to the will of the people; ordained in the Constitution *because we are in a state of war*.

And first, let us understand the nature and operation of the proclamation of emancipation, as it is termed; then, let us see the character and scope of the other proclamation, and the orders of the Secretary at War, designed to give it practical effect, and having done so, let us examine the asserted source of these powers.

The proclamation of emancipation, if taken to mean what in terms it asserts, is an executive decree, that on the first day of January next, all persons held as slaves, within such States or parts of States as shall then be designated, shall cease to be lawfully held to service, and may by their own efforts, and with the aid of the military power of the United States, vindicate their lawful right to their personal freedom.

The persons who are the subjects of this proclamation are held to service by the laws of the respective States in which they reside, enacted by State authority, as clear and unquestionable, under our system of government, as any law passed by any State on any subject.

This proclamation, then, by an executive decree, proposes to repeal and annul valid State laws which regulate the domestic relations of their people. Such is the mode of operation of the decree.

The next observable characteristic is, that this executive decree holds out this proposed repeal of State laws as a threatened *penalty* for the continuance of a governing majority of the people of each State, or part of a State, in rebellion against the United States. So that the President hereby assumes to himself the power to denounce it as a punishment against the entire people of a State, that the valid laws of that State which regulate the domestic condition of its inhabitants, shall become null and void, at a certain future date, by reason of the criminal conduct of a governing majority of its people.

This penalty, however, it should be observed, is not to be inflicted on those persons who have been guilty of treason.

The freedom of *their* slaves was already provided for by the act of Congress, recited in a subsequent part of the proclamation. It is not, therefore, as a punishment of guilty persons, that the commander-in-chief decrees the freedom of slaves. It is upon the slaves of loyal persons, or of those who, from their tender years, or other disability, cannot be either disloyal or otherwise, that the proclamation is to operate, if at all; and it is to operate to set them free, in spite of the valid laws of their States, because a majority of the legal voters do not send representatives to Congress.

Now it is easy to understand how persons held to service under the laws of these States, and how the army and navy under the orders of the President, may overturn these valid laws of the States, just as it is easy to imagine that any law may be *violated by physical force*. But I do not understand it to be the purpose of the President to incite a part of the inhabitants of the United States to rise in insurrection against valid laws; but that by virtue of some power which he possesses, he proposes to annul those laws, so that they are no longer to have any operation.

The second proclamation, and the orders of the Secretary of War, which follow it, place every citizen of the United States under the direct military command and control of the President. They declare and define new offences, not known to any law of the United States. They subject all citizens to be imprisoned upon a military order, at the pleasure of the President, when, where, and so long as he, or whoever is acting for him, may choose. They hold the citizen to trial before a military commission appointed by the President, or his representative, for such acts or omissions as the President may think proper to decree to be offences; and they subject him to such punishment as such military commission may be pleased to inflict. They create new offices, in such number, and whose occupants are to receive such compensation, as the President may direct; and the holders of these offices, scattered through the States, but with one chief inquisitor at Washington, are to inspect and report upon the loyalty of the citizens, with a view to the above described proceedings against them, when deemed suitable by the central authority.

Such is a plain and accurate statement of the nature and

extent of the powers asserted in these executive proclamations.

What is the source of these vast powers? Have they any limit? Are they derived from, or are they utterly inconsistent with, the Constitution of the United States?

The only supposed source or measure of these vast powers appears to have been designated by the President, in his reply to the address of the Chicago clergymen, in the following words: "Understand, I raise no objection against it on legal or constitutional grounds; for, *as commander-in-chief of the army and navy, in time of war, I suppose I have a right to take any measure which may best subdue the enemy.*" This is a clear and frank declaration of the opinion of the President respecting the origin and extent of the power he supposes himself to possess; and, so far as I know, *no source of these powers other than the authority of commander-in-chief in time of war, has ever been suggested.*

There has been much discussion concerning the question whether the power to suspend the "privilege of the writ of habeas corpus," is conferred by the Constitution on Congress, or on the President. The only judicial decisions which have been made upon this question have been adverse to the power of the President. Still, very able lawyers have endeavored to maintain, — perhaps to the satisfaction of others, — have maintained, that the power to deprive a particular person of "the privilege of the writ," is an executive power. For while it has been generally, and, so far as I know, universally admitted, that Congress alone can suspend a law, or render it inoperative, and consequently that Congress alone can prohibit the courts from issuing the writ, yet that the executive might, in particular cases, suspend or deny the privilege which the writ was designed to secure. I am not aware that any one has attempted to show, that under this grant of power to suspend "the privilege of the writ of habeas corpus," the President may annul the laws of States, create new offences, unknown to the laws of the United States, erect military commissions to try and punish them, and then, by a sweeping decree, suspend the writ of habeas corpus as to all persons who shall be "arrested by any military authority." I think he would make a more bold than wise experiment on the credulity of the people, who should attempt to convince

them that this power is found in the habeas corpus clause of the Constitution. No such attempt has been, and I think none such will be made. And therefore I repeat, that no other source of this power *has ever been suggested*, save that described by the President himself, as belonging to him as the commander-in-chief.

It must be obvious to the meanest capacity, that if the President of the United States has an *implied* constitutional right, as commander-in-chief of the army and navy in time of war, to disregard any one positive prohibition of the Constitution, or to exercise any one power not delegated to the United States by the Constitution, because, in his judgment, he may thereby "best subdue the enemy," he has the same right, for the same reason, to disregard each and every provision of the Constitution, and to exercise all power, *needful, in his opinion*, to enable him "best to subdue the enemy."

It has never been doubted that the power to abolish slavery within the States was not delegated to the United States by the Constitution, but was reserved to the States. If the President, as commander-in-chief of the army and navy in time of war, may, by an executive decree, exercise this power to abolish slavery in the States, which power was reserved to the States, because he is of opinion that he may thus "best subdue the enemy," what other power, reserved to the States or to the people, may not be exercised by the President, for the same reason, that he is of opinion he may thus best subdue the enemy? And if so, what distinction can be made between powers not delegated to the United States at all, and powers which, though thus delegated, are conferred by the Constitution upon some department of the government other than the executive? Indeed, the proclamation of September 24, 1862, followed by the orders of the war department, intended to carry it into practical effect, are manifest assumptions, by the President, of powers delegated to the Congress and to the judicial department of the government. It is a clear and undoubted prerogative of Congress alone, to define all offences, and to affix to each some appropriate and not cruel or unusual punishment. But this proclamation and these orders create new offences, not known to any law of the United States. "Discouraging enlistments," and "any disloyal practice," are not of-

fences known to any law of the United States. At the same time, they may include, among many other things, acts which are offences against the laws of the United States, and, among others, treason. Under the Constitution and laws of the United States, except in cases arising in the land and naval forces, every person charged with an offence is expressly required to be proceeded against, and tried by the judiciary of the United States and a jury of his peers; and he is required by the Constitution to be punished, in conformity with some act of Congress applicable to the offence proved, enacted before its commission. But this proclamation and these orders remove the accused from the jurisdiction of the judiciary; they substitute a report, made by some deputy provost marshal, for the presentment of a grand jury; they put a military commission in place of a judicial court and jury required by the Constitution; and they apply the discretion of the commission and the President, fixing the degree and kind of punishment, instead of the law of Congress fixing the penalty of the offence.

It no longer remains to be suggested, that if the ground of action announced by the President be tenable, he *may*, as commander-in-chief of the army and navy, use powers not delegated to the United States by the Constitution; or *may* use powers by the Constitution exclusively delegated to the legislative and the judicial departments of the government. These things have been already done, so far as the proclamations and orders of the President can effect them.

It is obvious, that if no private citizen is protected in his liberty by the safeguards thrown around him by the express provisions of the Constitution, but each and all of those safeguards may be disregarded, to subject him to military arrest upon the report of some deputy provost marshal, and imprisonment at the pleasure of the President, and trial before a military commission, and punishment at its discretion, because the President is of opinion that such proceedings "may best subdue the enemy," then all members of either house of Congress, and every judicial officer is liable to be proceeded against as a "disloyal person," by the same means and in the same way. So that, under this assumption concerning the implied powers of the President as commander-in-chief in time of war, if the President shall be of opinion that the arrest and incarceration, and trial before a military

commission, of a judge of the United States, for some judicial decision, or of one or more members of either house of Congress for words spoken in debate, is "a measure which may best subdue the enemy," there is then conferred on him by the Constitution the rightful power so to proceed against such judicial or legislative officer.

This power is certainly not found in any express grant of power made by the Constitution to the President, nor even in any delegation of power made by the Constitution of the United States to any department of the government. It is claimed to be found solely in the fact, that he is the commander-in-chief of its army and navy, charged with the duty of subduing the enemy. And to this end, as he understands it, he is charged with the duty of using, not only those great and ample powers which the Constitution and laws and the self-devotion of the people in executing them, have placed in his hands, but charged with the duty of using powers which the people have reserved to the States, or to themselves; and is permitted to break down those great constitutional safeguards of the partition of governmental powers, and the immunity of the citizen from mere executive control, which are at once both the end and the means of free government.

The necessary result of this interpretation of the Constitution is, that, in time of war, the President has any and all power, which he may deem it necessary to exercise, to subdue the enemy; and that every private and personal right of individual security against mere executive control, and every right reserved to the States or the people, rests merely upon executive discretion.

But the military power of the President is derived solely from the Constitution; and it is as sufficiently defined there as his purely civil power. These are its words: "The President shall be the Commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

This is his military power. He is the general-in-chief; and as such, in prosecuting war, may do what generals in the field are allowed to do within the sphere of their actual operations, *in subordination to the laws of their country, from which alone they derive their authority.**

* The case of *Mitchel vs. Harmony* (13 How. 115), presented for the decision of the Supreme Court of the United States, the question of the

When the Constitution says that the President shall be the commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States, does it mean that he shall possess military power and command *over all citizens of the United States*; that, by military edicts, he may control all citizens, as if enlisted in the army or navy, or in the militia called into the actual service of the United States? Does it mean that he may make himself a legislator, and enact penal laws governing the citizens of the United States, and erect tribunals, and create offices to enforce his penal edicts upon citizens? Does it mean that he may, by a prospective executive decree, repeal and annul the laws of the several States, which respect subjects reserved by the Constitution for the exclusive

extent of the right of a commanding general in the field to appropriate private property to the public service, and it was decided that such an appropriation might be made, in case it should be rendered necessary by an immediate and pressing danger or urgent necessity existing at the time, and not admitting of delay, but not otherwise.

In delivering the opinion of the Court, the Chief Justice said:—"Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is: whether the law permits it to be taken, to insure the success of any enterprise against a public enemy, which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it. The case mentioned by Lord Mansfield, in delivering his opinion in *Mostyn vs. Fabrigas* (1 Cowp. 180), illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property and without the authority of law; and the officer who executed the order was held liable to an action; and the sutlers recovered damages against him to the value of the property destroyed. This case shows how carefully the rights of property are guarded by the laws of England; and they are certainly not less valued, nor less securely guarded, under the Constitution and laws of the United States."

It may safely be said that neither of the very eminent counsel by whom that case was argued, and that no judge before whom it came, had then advanced to the conception that a commanding general may lawfully take any measure which may best subdue the enemy. The wagons, mules, and packages seized by General Donopon, in that case, were of essential service in his brilliant and successful attack on the lines of Chihuahua. But this did not save him from being liable to their owner as a mere wrongdoer, under the Constitution and laws of the United States.

action of the States and the people? The President is the commander-in-chief of the army and navy, not only by force of the Constitution, but under and subject to the Constitution, and to every restriction therein contained, and to every law enacted by its authority, as completely and clearly as the private in his ranks.

He is general-in-chief; but can a general-in-chief *disobey any law of his own country*? When he can, he super-adds to his *rights* as commander the *powers* of a usurper; and that is military despotism. In the noise of arms have we become deaf to the warning voices of our fathers, to take care that the military shall always be subservient to the civil power? Instead of listening to these voices, some persons now seem to think that it is enough to silence objection, to say, true enough, there is no civil right to do this or that, but it is a military act. They seem to have forgotten that every military act is to be tested by the Constitution and laws of the country under whose authority it is done. And that under the Constitution and laws of the United States, no more than under the government of Great Britain, or under any free or any settled government, the mere authority to command an army, is not an authority to disobey the laws of the country.

The framers of the Constitution thought it wise that the powers of the commander-in-chief of the military forces of the United States should be placed in the hands of the chief civil magistrate. But the powers of Commander-in-chief are in no degree enhanced or varied by being conferred upon the same officer who has important civil functions. If the Constitution had provided that a Commander-in-chief should be appointed by Congress, his powers would have been the same as the military powers of the President now are. And what would be thought by the American people of an attempt by a general-in-chief, to legislate by his decrees, for the people and the States.

Besides, all the powers of the President are executive merely. He cannot make a law. He cannot repeal one. He can only execute the laws. He can neither make, nor suspend, nor alter them. He cannot even make an article of war. He may govern the army, either by general or special orders, but only in subordination to the Constitution and laws of the United States, and the articles of war enacted by the legislative power.

The time has certainly come when the people of the United States *must* understand, and *must* apply those great rules of civil liberty, which have been arrived at by the self-devoted efforts of thought and action of their ancestors, during seven hundred years of struggle against arbitrary power. If they fail to understand and apply them, if they fail to hold every branch of their government steadily to them, who can imagine what is to come out of this great and desperate struggle. The military power of eleven of these States being destroyed — what then? What is to be their condition? What is to be *our* condition?

Are the great principles of free government to be used and consumed as means of war? Are we not wise enough and strong enough to carry on this war to a successful military end, without submitting to the loss of any one great principle of liberty? We are strong enough. *We are wise enough*, if the people and their servants will but understand and observe the just limits of military power.

What, then, are those limits? They are these. There is military law; there is martial law. *Military* law is that system of laws enacted by the legislative power for the government of the army and navy of the United States, and of the militia when called into the actual service of the United States. It has no control whatever over any person or any property of any citizen. It could not even apply to the teamsters of an army, save by force of express provisions of the laws of Congress, making such persons amenable thereto. The persons and the property of private citizens of the United States, are as absolutely exempted from the control of military law as they are exempted from the control of the laws of Great Britain.

But there is also *Martial law*. What is this?¹ It is the

¹ The following extracts from the opinion of Mr. Justice Woodbury, delivered in the Supreme Court of the United States in the case of *Luther vs. Borden*, (7 How. 62,) states what martial law is, and some of the incidents of its history: —

“By it every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with a rope round his neck, subject to be hung up by a military despot at the next lamp-post, under the sentence of some drum-head court-martial. See *Simmons's Pract. of Courts-Martial*, 40. See such a trial in *Hough on Courts-Martial*, 383, where the victim on the spot was ‘blown away by a gun,’ ‘neither time, place, nor persons considered.’ As an illustration how the passage of such

will of a military commander, operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom this law extends. But, under the Constitution of the United States, *over whom does such law extend?*

Will any one be bold enough to say, in view of the history of our ancestors and ourselves, that the President of the United States can extend such law as that over the entire country, or over any defined geographical part thereof, save in connection with some particular military operations which he is carrying on there? Since Charles I. lost his head, there has been no king in England who could make such

a law may be abused, Queen Mary put it in force in 1558, *by proclamation merely*, and declared, 'that whosoever had in his possession any heretical, treasonable, or seditious books, and did not presently burn them, without reading them or showing them to any other person, should be esteemed a rebel, and without any further delay be executed by the martial law.' Tytler on Military Law, p. 50, c. 1, § 1.

"For convincing reasons like these, in every country which makes any claim to political or civil liberty, 'martial law' as here attempted, and as once practised in England against her own people, has been expressly forbidden there for near two centuries, as well as by the principles of every other free constitutional government. 1 Hallam's Const. Hist. 420. And it would be not a little extraordinary, if the spirit of our institutions, both state and national, was not much stronger than in England against the unlimited exercise of martial law over a whole people, whether attempted by any chief magistrate, or even by a legislature.

"One object of parliamentary inquiry, as early as 1620, was to check the abuse of martial law by the king, which had prevailed before. Tytler on Military Law, 502. The Petition of Right, in the first year of Charles I., reprobated all such arbitrary proceedings in the just terms and in the terse language of that great patriot as well as judge, Sir Edward Coke, and prayed they might be stopped and never repeated. To this the king wisely replied, '*Soit droit fait comme est désiré.*' — 'Let right be done as desired.' Petition of Right in Statutes at Large, 1 Charles I.

"Putting it in force by the King alone was not only restrained by the Petition of Right, early in the seventeenth century, but virtually denied as lawful by the Declaration of Rights in 1688. Tytler on Military Law, 307. Hallam, therefore, in his Constitutional History, 420, declares, that its use by 'the commissioners to try military offenders by martial law, was a procedure necessary, within certain limits, to the discipline of an army, but unwarranted by the constitution of this country.' Indeed, a distinguished English judge has since said, that 'martial law' as of old, now 'does not exist in England at all,' was 'contrary to the Constitution, and has been for a century totally exploded.' *Grant v. Gould*, 2 Hen. Bl. 69; 1 Hale, P. C. 346; Hale Com. Law, c. 2, 36; 1 MacArthur, 55.

"This is broad enough, and is correct as to the community generally, in both war and peace."

law, in that realm. And where is there to be found, in our history, or our constitutions, either State or national, any warrant for saying, that a President of the United States has been empowered by the Constitution to extend martial law over the whole country, and to subject thereby to his military power, every right of every citizen? He has no such authority.

In time of war, a military commander, whether he be the commander-in-chief, or one of his subordinates, must possess and exercise powers both over the persons and the property of citizens which do not exist in time of peace. But he possesses and exercises such powers, *not in spite of the Constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordination thereto.* The general who moves his army over private property in the course of his operations in the field, or who impresses into the public service means of transportation, or subsistence, to enable him to act against the enemy, or who seizes persons within his lines as spies, or destroys supplies in immediate danger of falling into the hands of the enemy, uses authority unknown to the Constitution and laws of the United States in time of *peace*; but not unknown to that Constitution and those laws in time of *war*. The power to declare war, includes the power to use the customary and necessary means effectually to carry it on. As Congress may institute a state of war, it may legislate into existence and place under executive control the means for its prosecution. And, in time of war without any special legislation, not the commander-in-chief only, but every commander of an expedition, or of a military post, is lawfully empowered by the Constitution and laws of the United States to do whatever is necessary, and is sanctioned by the laws of war, to accomplish the lawful objects of his command. But it is obvious that this implied authority must find early limits somewhere. If it were admitted that a commanding general in the field might do whatever in his discretion might be necessary to subdue the enemy, he could levy contributions to pay his soldiers; he could force conscripts into his service; he could drive out of the entire country all persons not desirous to aid him;—in short, he would be the absolute master of the country for the time being.

No one has ever supposed — no one will now undertake to maintain — that the commander-in-chief, in time of war, has any such lawful authority as this.

What, then, is his authority over the persons and property of citizens? I answer, that, over all persons enlisted in his forces he has military power and command; that over all persons and property *within the sphere of his actual operations in the field*, he may lawfully exercise such restraint and control as the successful prosecution of his particular military enterprise may, in his honest judgment, absolutely require; and upon such persons as have committed offences against any article of war, he may, through appropriate military tribunals, inflict the punishment prescribed by law. *And there his lawful authority ends.*

The military power over citizens and their property is a power to *act*, not a power to prescribe rules for *future* action. It springs from present pressing emergencies, and is limited by them. It cannot assume the functions of the statesman or legislator, and make provision for future or distant arrangements by which persons or property may be made subservient to military uses. It is the physical force of an army in the field, and may control whatever is so near as to be actually reached by that force, in order to remove obstructions to its exercise.

But when the military commander controls the persons or property of citizens, who are beyond the sphere of his actual operations in the field when he makes laws to govern their conduct, he becomes a legislator. Those laws may be made actually operative; obedience to them may be enforced by military power; their purpose and effect may be solely to recruit or support his armies, or to weaken the power of the enemy with whom he is contending. *But he is a legislator still*; and whether his edicts are clothed in the form of proclamations, or of military orders, by whatever name they may be called, they are laws. If he have the legislative power, conferred on him by the people, it is well. If not, he usurps it.

He has no more lawful authority to hold all the *citizens* of the entire country, outside of the sphere of his actual operations in the field, amenable to his military edicts, than he has to hold all the *property* of the country subject to his military requisitions. He is not the military commander of the *citizens* of the United States, but of its *soldiers*.

Apply these principles to the proclamations and orders of the President. They are not designed to meet an existing emergency in some particular military operation in the field; they prescribe future rules of action touching the persons and property of citizens. They are to take effect, not merely within the scope of military operations in the field, or in their neighborhood, but throughout the entire country, or great portions thereof. Their subject-matter is not military offences, or military relations, but civil offences, and domestic relations; the relation of master and servant; the offences of "disloyalty, or treasonable practices." Their purpose is not to meet some existing and instant military emergency, but to provide for distant events, which may or may not occur; and whose connections, if they should coincide with any particular military operations, are indirect, remote, casual, and possible merely.

It is manifest that in proclaiming these edicts, the President is not acting under the authority of military law; first, because military law extends only over the persons actually enlisted in the military service; and second, because these persons are governed by laws enacted by the legislative power. It is equally manifest that he is not acting under that implied authority which grows out of particular actual military operations; for these executive decrees do not spring from the special emergencies of any particular military operations and are not limited to any field, in which any such operations are carried on.

Whence, then, do these edicts spring? They spring from the assumed power to extend martial law over the whole territory of the United States; a power, for the exercise of which by the President, there is no warrant whatever in the Constitution; a power which no free people could confer upon an executive officer, and remain a free people. For it would make him the absolute master of their lives, their liberties, and their property, with power to delegate his mastership to such satraps as he might select, or as might be imposed on his credulity, or his fears. Amidst the great dangers which encompass us, in our struggles to encounter them, in our natural eagerness to lay hold of efficient means to accomplish our vast labors, let us beware how we borrow weapons from the armory of arbitrary power. They cannot be wielded by the hands of a free people. Their blows will finally fall upon themselves.

Distracted councils, divided strength, are the very earliest effects of an attempt to use them. What lies beyond, no patriot is now willing to attempt to look upon.

A leading and influential newspaper, while expressing entire devotion to the President, and approbation of his proclamation of emancipation, says: "The Democrats talk about 'unconstitutional acts.' Nobody pretends that this act is constitutional, and nobody cares whether it is or not."

I think too well of the President, to believe he has done an act involving the lives and fortunes of millions of human beings, and the entire social condition of a great people, without *caring* whether it is conformable to that Constitution which he has, many times, sworn to support.

Among all the causes of alarm which now distress the public mind, there are few more terrible to reflecting men, than the tendency to lawlessness which is manifesting itself in so many directions. No stronger evidence of this could be afforded, than the open declaration of a respectable and widely circulated journal, that "nobody cares" whether a great public act of the President of the United States, is in conformity with, or is subversive of the supreme law of the land,—the only basis upon which the government rests; that our public affairs have become so desperate, and our ability to retrieve them by the use of honest means is so distrusted, and our willingness to use other means so undoubted, that our great public servants may themselves break the fundamental laws of the country, and become usurpers of vast powers not intrusted to them, in violation of their solemn oaths of office; and "nobody cares."

It is not believed that this is just to the people of the United States. They do *care*, and the President *cares*, that he and all other public servants should obey the Constitution. Partisan journals, their own honest and proper desire to support the President,—on whose wisdom and firmness they rely to relieve their country from its evils and dangers,—and the difficulties which the mass of the people encounter in forming opinions on questions of constitutional law, may prevent them, for a limited time, from arriving at a just judgment of such questions, *or of the vast practical effects dependent on them.*

But the people of the United States do not expect national

concord to spring from usurpations of power; or national security from the violation of those great principles of public liberty, which are the only possible foundation, in this country, of private safety and of public order. Their instincts demand a purer and more comprehensive statesmanship than that which seizes upon unlawful expedients, because they may possibly avert for the moment some threatening danger, at the expense of the violation of great principles of free government, or of the destruction of some necessary safeguard of individual security.

It is a subject of discussion in the public journals whether it is the intention of the Executive to use the powers asserted in the last proclamation and in the orders of the Secretary of War, to suppress free discussion of political subjects. I have confidence in the purity and the patriotism both of the President and of the Secretary of War. I fear no such present application of this proclamation and these orders by them. But the execution of such powers must be intrusted to subordinate agents, and it is of the very essence of arbitrary power that it should be in hands which can act promptly and efficiently, and unchecked by forms. These great powers must be confided to persons actuated by party, or local or personal feelings and prejudices; or, what would often prove as ruinous to the citizen, actuated by a desire to commend their vigilance to their employers, and by a blundering and stupid zeal in their service.

But it is not this or that particular application of power which is to be considered. It is the existence of the power itself, and the uses of which it is susceptible, while following out the principle on which it has been assumed.

The uses of power, even in despotic monarchies, are more or less controlled by usages and customs, or in other words, by public opinion. In good hands, and in favorable times, despotic power is not commonly allowed to be felt to be oppressive; and, always, the forms of a free government, which has once existed, so far as is practicable, are carefully and speciously preserved. But a wise people does not trust its condition and rights to the happy accident of favorable times or good hands. It is jealous of power. It knows that of all earthly things, it is that thing most likely to be abused; and when it affects a nation, most destructive by

its abuse. They will rouse themselves to consider what is the power claimed; what is its origin; what is its extent; what uses may be made of it in dangerous times, and by men likely to be produced in such times;—and while they will trust their public servants, and will pour out their dearest blood like water to sustain them in their honest measures for their country's salvation, they will demand of those servants obedience to their will, as expressed in the fundamental laws of the government, to the end that there shall not be added to all the sufferings and losses they have uncomplainingly borne, that most irreparable of all earthly losses — the ruin of the principles of their free government.

What then is to be done? Are we to cease our utmost efforts to save our country, because its chief magistrate seems to have fallen, for the time being, into what we believe would be fatal errors if persisted in by him and acquiesced in by ourselves? Certainly not. Let the people but be right, and no President can long be wrong; nor can he effect any fatal mischief if he should be.

The sober second thought of the people has yet a controlling power. Let this gigantic shadow, which has been evoked out of the powers of the commander-in-chief, once be placed before the people, so that they can see clearly its proportions and its mien, and it will dissolve and disappear like the morning cloud before the rising sun.

The people yet can and will take care, by legitimate means, without disturbing any principle of the Constitution, or violating any law, or relaxing any of their utmost efforts for their country's salvation, that their will, embodied in the Constitution, shall be obeyed. If it needs amendment, they will amend it themselves. They will suffer nothing to be added to it, or taken from it, by any other power than their own. If they should, neither the government itself, nor any right under it, will any longer be theirs.

71.2009.084.00800

9